Before the
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of:

NATIONAL CITY MORTGAGE CO.

Petition For Declaratory Ruling with Respect of Certain Provisions of the Florida Statutes.
_____/

CG Docket No. 02-278

STATE OF FLORIDA'S MOTION TO DISMISS
FOR LACK OF JURISDICTION AND OTHER GROUNDS

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INTRODUCTION

State of Florida, Florida of Agriculture and Consumer Services, ("Florida") is a state regulatory agency and the enforcing authority of Section 501.059, Florida Statutes. Florida, pursuant to Section 501.059(4), Florida Statutes maintains a list of telephone numbers of consumers that do not want to receive telephone solicitation calls from telephone solicitors or telemarketers. These consumers pay Florida an annual fee to have their telephone number appear on the "no sales solicitation call" list. The No-Sales Statute (§501.059(4), Fla. Stat.) prohibits unsolicited telephonic sales calls to be made to persons whose numbers appear on the list published by Florida.

Further, Section 501.059(7), Florida Statutes makes it unlawful for a telemarketer to make, or cause to be made, a telephonic sales call and use, or knowingly allow, an automated dialing system for the selection and dialing of telephone numbers or playing a recorded message when the number called is answered.

Florida received a complaint from a consumer that National City Mortgage Co., was violating Florida's statutes by making, or causing to be made, unsolicited telephonic sales calls to such consumer whose name was on the state's no sales solicitation call list and playing, or causing to be played, a recorded messages when the number called was answered. Florida sent a letter to National City Mortgage Co., together with a copy of the consumer's complaint and a copy of Florida's statute. No court action has been commenced against National City Mortgage Co. There is no reference in Florida's letter to National City Mortgage Co., that the telephonic sales call was an intrastate or interstate call.

National City Mortgage Co., seeks to have the FCC to declare that Florida's statute is preempted by Federal Law. The relief sought from the FCC by National City Mortgage is an attempt to allow a telemarketer to make calls to Florida consumers and play a recorded message when the number called is answered, in violation of Florida law.

SOVEREIGN IMMUNITY BARS FCC FROM HEARING THIS MATTER

ISSUE

The FCC does not have jurisdiction in this matter because the State of Florida's sovereign immunity protects it from being brought before a federal administrative tribunal. See Federal Maritime Commission v. South Carolina State Port Authority, et al., 535 U.S. 743, 122 S. Ct. 1864, 152 L. Ed. 2d 962 (2002).

ARGUMENT

The FCC does not have jurisdiction in this matter because the State of Florida's sovereign immunity prohibits the Federal Administrative Agency from hearing this matter. Florida does not consent to participate in the proceeding and Florida's sovereign immunity is neither waived, nor abrogated by Congress.

In the case of Federal Maritime Commission v. South Carolina State Ports Authority, et al. 535 U.S. 743, 122 S. Ct. 1864, 152 L. Ed. 2d 962 (2002) the United States Supreme Court upheld a State's jurisdictional challenge of a Federal Administrative Agency's jurisdiction on the grounds of sovereign immunity. The Federal Maritime Commission sought to take administrative action against South Carolina State Port Authority upon the complaint of a cruise ship company. In finding the Federal Administrative Agency did not have jurisdiction to hear the case the United States Supreme Court held:

> "It is for this reason, for instance, that sovereign immunity applies regardless of whether the private Plaintiff's suit is for monetary damages or some other type of relief. See *Seminole Tribe,* 517 U.S., at 58, 116 S. Ct. 1114 ('[W]e have often made it clear that the relief sought by a Plaintiff suing a State is irrelevant to the question whether the suit is barred by the Eleventh Amendment").
>
> Sovereign immunity does not merely constitute a defense to monetary liability or even to all types of liability. Rather, it provides an immunity from suit."

The United State Supreme Court further held in Federal Maritime Commission, at 767-768:

> "…we noted in *Seminole Tribe* that 'the background principle of the state sovereign immunity embodied in the Eleventh Amendment is not so ephemeral as to dissipate when the subject of the suit is an area … that is under the exclusive control of the Federal Government," 517 U.S. at 72, 116 S. Ct. at 1114. Thus, '[e]ven when the Constitution vests in Congress complete lawmaking authority over a particular area, the Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting States.' *Ibid*."

National City Mortgage Co.'s Petition for For Declaratory Relief is an action by a private citizen (a corporation) to have a Federal Administrative Agency find that Florida's statutes are preempted by Federal law. This is an analogous factual situation giving rise to the Federal Maritime Commission case. The United States Supreme Court held that sovereign immunity prohibited the Federal Administrative Agency from proceeding against a State. The principle of the Federal Maritime Commission case would prohibit a Federal Administrative Agency from proceeding against a State by finding (upon request of a private citizen) a State's law is preempted by Federal law.

The exception to the sovereign immunity exemption of Ex Parte Young 209 U. S. 123 (1908) does not apply in this case. Ex Parte Young held that the Eleventh Amendment does not bar lawsuits that seek future equitable relief to discontinue ongoing violations of federal law by State officers. Ex Parte Young prescribed to a legal fiction that the State officers who act contrary to the Constitution or federal law strip themselves of their official capacity and thus, their derivative sovereign immunity. There are no such allegations of improper activities by the Defendant's employees in this matter.

Finally, there is no controversy pending by Florida against National City Mortgage Co. Florida merely mailed a letter with a copy of a complaint from a consumer and copy of Florida's statute to Capital City Mortgage Co.

TCPA DOES NOT PREMPT STATE LAW

ISSUE

TCPA specifically provides that State law is not preempted and that States can enforce State law.

ARGUMENT

Without waiving it jurisdictional argument set forth above, Florida will show that Telephone Consumer Protection Act, 47 U.S.C. §227 ("TCPA") does not preempt Florida's statute. In fact, TCPA specifically provides that it does **not** preempt state law. TCPA at 47 U.S.C. §227(e) provides:

> "(1) **State law is not preempted.** Except for the standards under subsection (d) and subject to paragraph (2) of this subsection, nothing in this section or in the regulations prescribed under this section shall preempt any State law that imposes more restrictive intrastate requirements or regulations or which prohibits—
>
> (A) the use of telephone facsimile machines or other electronic devices to send unsolicited advertisement;
>
> (B) the use of automatic telephone dialing systems;
>
> (C) the use of artificial or prerecorded voice messages; or
>
> (D) the making of telephone solicitation."

Further, TCPA at 47 U.S.C. §227(f)(6) provides:

> "**Effect on State court proceedings**. Nothing contained in this subsection shall be construed to prohibit an authorized State official from proceeding in State court on the basis of an alleged violation of any general civil or criminal statute of such State."

TCPA at several points shows that it is intended to allow state court jurisdiction over interstate calls. For example, 47 U.S.C. §227(b)(3), part of the TCPA subsection dealing with misuse of automated telephone equipment, provides in part that "[a] person or entity may, **if otherwise permitted by laws or**

rules of court of a State, bring in an appropriate court of that state… an action based on a violation of this subsection or the regulations proscribed under this section…" (emphasis added). Similarly, the TCPA subsection dealing with violations of the "Do Not Call" registry provides that "[a] person who has received more than one telephone call within any 12-month period by or on behalf of the same entity in violation of the regulations proscribed under this subsection **may, if otherwise permitted by the laws or rules of court of a State bring in an appropriate court of that State…**an action to recover for actual monetary loss from such violation, or to receive up to $500 in damages for each such violation, whichever is greater." 47 U.S.C. §227(c)(5) (emphasis added).

National City Mortgage Co., seeks to nullify and frustrate Florida's objectives where they diverge from FCC regulations. National City Mortgage Co., argues that TCPA preempts Section 501.059, Florida Statutes because Florida's law would frustrate regulatory uniformity. The paramount goal of TCPA is consumer protection, not a uniform regulatory scheme.

Courts (and presumably executive agencies whose decisions are reviewable by courts) will not infer preemption and will always presume Congress did not intend to displace State law unless Congress does so clearly and unmistakably. Gregory v. Ascroft, 501 U.S. 452, 461 (1991) (a court will not construe a federal statute to "upset the unusual constitutional balance of federal and state powers" unless Congress "[made] its intention to do so unmistakably clear to the language of the statute.").

The presumption against preemption is especially important when determining the preemptive effect of administrative regulation, as opposed to the underlying federal statute. As explained by the court in Hillsborough County v. Automated Medical Labs, Inc., 471 U.S. 707, 717, 105 S. Ct. 2371, 85 L. Ed. 2d 714 (1985):

> As a result of their specialized functions, agencies normally deal with problems in far more detail than does Congress. To infer pre-emption whenever an agency deals with a problem comprehensively is virtually tantamount to saying that whenever a federal agency steps into a field, its regulations will be exclusive. Such a rule, of course, would be inconsistent with the federal-state balance embodied in our Supremacy Clause jurisprudence.

And, consumer protection laws enjoy an even greater presumption against preemption:

> Laws concerning consumer protection, including laws prohibiting false advertising and unfair business practices, are included with the states police power, and are thus subject to this heightened presumption against preemption. (See California v. ARC Americal Corp. (1989) 490 U.S. 93, 101, 109 S. Ct. 1661, 104 L.Ed. 2d 86 [unfair business practices]; Smiley v. Citibank (1995 11 Cal. 4th 138, 148, 44 Cal. Rptr 2d 441, 900 P.2d 690 [consumer protection], affd. (1996) 517 U.S. 735, 116 S. Ct. 1730, 135 L. Ed. 2d 25 ….

Black v. Financial Freedom Senior Funding Corp., 92 Cal. App. 4th 917, 112 Cal. Rptr. 2d 445, 452-53 (Cal Ct App. 2001).

In Van Bergen v. Minnesota, 59 F. 3d 1541 (8th "Cir,. 1995) the Court addressed the TCPA preemption issue with respect to the Minnesota statute regulating ADAD calls to consumers. In Van Bergen, a gubernatorial candidate in Minnesota brought an action against the State Attorney General, arguing the the TCPA preempted Minnesota's statute prohibiting the use of automatic dialing-announcing devices. The Court said:

> The congressional findings appended to the TCPA state that "[o]ver half the States now have statutes restricting various uses of telephone for marketing, but telemarketers can evade their prohibitions through interstate operation; therefore Federal law is need to control residential telemarketing practices. 47 U.S.C. §227, Congressional Statement of Findings (7). This finding suggests that the TCPA was intended not to supplement state law but to provide interstitial law preventing evasion of state law by calling across state lines."

Contrary to National City Mortgage Co., argument, Congress enacted the TCPA to broaden State authority, not supplant State law.

Finally, there is not conflict preemption. Conflict preemption occurs where compliance with both federal and state laws is a physical impossibility. "Thus, if it is possible to comply with both federal and state law, there is neither conflict nor a frustrated purpose. See generally Rotunda, R. & Nowak, J., Treatise on Constitutional Law; Substance and Procedure, §12 (2d ed. 1992 & Supp. 1993)." Bravman v. Baxter Healthcare Corp., 842 F. Supp. 747, 753 (S.D. N.Y. 1994; see also Ginochio v. Surgikos Inc., 864 F. Supp. 948, 951 (same). Here it is possible for National City Mortgage Co., to comply with both laws simply by following the Florida law. Doing so does not violate any provision of the TCPA.

FLORIDA'S ACTION NOT COVERED BY TCPA

ISSUE

Florida Statute 501.059 involves a cause of action not encompassed within the parameters of TCPA.

ARGUMENT

Without waiving it jurisdictional argument set forth above, Florida asserts TCPA defines "telephone solicitation" as the initiation of a telephone call. TCPA also provides that it is unlawful to initiate or make the telephone solicitation to persons whose name appear on the federal do-not-call list. However, Florida's law is different. Section 501.059(4), Florida Statutes, provides:

> "No telephone solicitor shall make **or cause to be made** any unsolicited telephonic sales call to any residential, mobile or telephonic paging device telephone number, if the number for that telephone appears in the then-current quarterly listing published by the Florida." [Emphasis added]

Also, section 501.059(7), Florida Statutes, provided:

> "No person shall make **or knowingly allow a telephonic sales call to be made** if such call involves an automated system for the selection or dialing of telephone numbers or the playing of a recorded message when a connection is completed to the number called." [Emphasis added]

The matter is not preempted and the action (if an action is ever brought) against the National City Mortgage Co., for causing the unlawful telephone solicitation calls to be made is not covered by the TCPA. The entity making that call and the entity causing the call to be made may be two separate entities. For example, a Florida corporation hiring a California company to make the calls is liable for violation of Florida's statute if

the California company fails or refused to obey Florida's law in the manner that such calls are made on behalf of the Florida corporation.

Thus, National City Mortgage Co., (1) having caused the calls to be made to persons whose names appear on the do not call list, and (2) having knowingly allowed prerecorded messages to be played when the number called was answered, are separate causes of action which can be enforce by Florida.

CONCLUSION

For the reason stated herein, the Petition filed by National City Mortgage Co., should be dismissed (1) because FCC does not have jurisdiction because of sovereign immunity; or (2) because the Florida's law is not preempted; or (3) Florida's law is not covered by TCPA.

Certificate of Service

I HEREBY CERTIFY that a true copy of the foregoing has been served on Charles H. Kennedy, Esq., 2000 Pennsylvania Avenue NW, Washington, D.C. 20006-1888 by regular U.S. Mail, postage prepaid, on this ___ day of January, 2005.

By: _____

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